

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

**Case No. 03-1352-JAR**

## MEMORANDUM & ORDER

Plaintiff Rocksana J. Urbanek brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security's denial of her application for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act) and supplemental security income under Title XVI of the Act. According to plaintiff, defendant erred in assessing her credibility, erred in determining her residual functional capacity, and erred in determining that she could perform her past relevant work. As explained in more detail below, the Court rejects each of plaintiff's arguments and affirms defendant's decision.

## I. Procedural Background

On October 22, 2001, and October 18, 2001, plaintiff filed her applications for a period of disability, disability insurance benefits, and supplemental security income, claiming disability since November 14, 1999, due to stomach problems, blood pressure problems, dizziness, problems breathing, and back and knee problems. The application was denied both initially and upon

reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on June 17, 2003, at which both plaintiff and her counsel were present. On July 7, 2003, the ALJ rendered a decision denying all benefits on the basis that plaintiff was not under a "disability" as defined by the Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; her request for review was denied on September 12, 2003. Thus, the ALJ's decision is the final decision of defendant.

## **II. Standard of Review**

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.<sup>1</sup> The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.<sup>3</sup>

## **III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings**

"Disability" is defined in the Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ."<sup>4</sup> The Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot,

---

<sup>1</sup>See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

<sup>2</sup>*Id.* (quoting *Castellano*, 26 F.3d at 1028).

<sup>3</sup>*Id.*

<sup>4</sup>*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .”<sup>5</sup>

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,<sup>6</sup> and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.<sup>7</sup> Step one determines whether the claimant is presently engaged in substantial gainful activity.<sup>8</sup> If she is, disability benefits are denied.<sup>9</sup> If she is not, the decision maker must proceed to the second step.<sup>10</sup> Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has a medically severe impairment or combination of impairments.”<sup>11</sup> This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.<sup>12</sup> Pursuant to the severity regulations, the claimant must make a threshold showing that her medically determinable

---

<sup>5</sup>*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

<sup>6</sup>*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* (quoting *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)).

<sup>12</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

impairment or combination of impairments significantly limits her ability to do basic work activities.<sup>13</sup> If the claimant is unable to show that her impairments would have more than a minimal effect on her ability to do basic work activities, she is not eligible for disability benefits.<sup>14</sup> If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.<sup>15</sup> The ALJ in this case concluded that plaintiff satisfied the severity requirement based on the following impairments: arthritis and degeneration of the lumbar spine and knees; headaches; colitis; gastroesophageal reflux disease (GERD); obesity; and blackout spells and dizziness of undetermined origin. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”<sup>16</sup> If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.<sup>17</sup> If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”<sup>18</sup> If the claimant is able to perform her previous work, she is not disabled.<sup>19</sup> With respect to the third step of the process in this case, the ALJ determined that plaintiff’s impairments were not listed or medically

---

<sup>13</sup>*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

<sup>14</sup>*Id.* at 751.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

<sup>19</sup>*Id.*

equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was not disabled because she was able to perform her past relevant work as a counter helper and a waitress/cashier.

Although the ALJ determined plaintiff was not disabled at step four, he proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of his age, education, and work experience.”<sup>20</sup> An ALJ is allowed to make a step five determination even if he finds that plaintiff is not disabled at step four.<sup>21</sup> At this point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”<sup>22</sup> At this step, the ALJ also concluded that plaintiff was not disabled, finding that plaintiff could perform a significant number of jobs in the economy, including the full range of unskilled, sedentary work. The ALJ also determined plaintiff could perform unskilled, light work with the job base reduced two to three percent by nonexertional limitations.

#### **IV. Analysis of Plaintiff’s Specific Arguments**

In her motion, plaintiff contends that the ALJ erred in: finding her testimony not credible; determining her RFC; and in determining that she could return to her past work. The Court addresses

---

<sup>20</sup>See *id.* (quoting *Bowen v. Yuckert*, 482 U.S. at 142).

<sup>21</sup>*Murrell v. Shalala*, 43 F.3d 1388 (10th Cir. 1994).

<sup>22</sup>See *Williams*, 844 F.2d at 751 (citations omitted); accord *White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

each of these arguments in turn.

*A. Assessment of Plaintiff's Credibility*

Plaintiff asserts that the ALJ failed to properly assess her credibility in accordance with Social Security Ruling (SSR) 96-7p and the Tenth Circuit's opinion in *Luna v. Bowen*.<sup>23</sup> Under *Luna*, the ALJ must apply a three part test. First, the ALJ must determine whether the claimant has a pain producing impairment.<sup>24</sup> Second, the ALJ must determine whether there is a loose nexus between the pain alleged and the impairment.<sup>25</sup> Third, the ALJ must determine whether the claimant's subjective complaints are credible, considering the objective medical evidence and such factors as: the claimant's persistent attempts to find relief and her willingness to try any treatment prescribed; whether the claimant has regular contact with a doctor; the claimant's daily activities; the claimant's regular use of crutches or a cane; and the dosage, effectiveness, and side effects of the claimant's medication.<sup>26</sup> Moreover, the ALJ must give specific reasons for rejecting a claimant's subjective complaints.<sup>27</sup> Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.<sup>28</sup>

---

<sup>23</sup>834 F.2d 161 (10th Cir. 1987).

<sup>24</sup>*Id.* at 164.

<sup>25</sup>*Id.*

<sup>26</sup>*Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (citing *Luna*, 834 F.2d at 165-66).

<sup>27</sup>*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

<sup>28</sup>*Id.* (citing *Kepler*, 68 F.3d at 390-91).

A review of the ALJ's decision in this case reveals that he properly assessed plaintiff's credibility. The ALJ's assessment was based on several specific factors including the objective medical evidence, inconsistencies in plaintiff's testimony, lack of recent medical treatment, lack of side effects or ineffective medicine, the fact that plaintiff treats her pain with over the counter medication, and plaintiff's activities of daily living.

Plaintiff argues that the ALJ erred by not addressing each of the factors from SSR 96-7p and *Luna*. Plaintiff notes that the ALJ failed to discuss the frequency and intensity of her pain and the precipitating and aggravating factors for her pain. However, the ALJ is not required to discuss each and every factor in his decision.<sup>29</sup> The ALJ discussed many of the factors and supported his discussion with substantial evidence. Plaintiff has not shown how this analysis was in error.

Plaintiff argues that the ALJ's credibility determination is inconsistent because after he assessed the medical evidence, he concluded that the degenerative changes in plaintiff's knees and spine were not significant; yet at step two he found plaintiff's severe impairments included arthritis and degeneration of the lumbar spine and knees. This is not an inconsistency because an impairment is severe if it just has more than a minimal effect on a claimant's ability to do basic work activities,<sup>30</sup> and an RFC assessment includes "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis."<sup>31</sup> Furthermore, the ALJ analyzes credibility after he determines severe impairments at step two, but before determining what limitations to

---

<sup>29</sup>*Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993).

<sup>30</sup>*Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1998).

<sup>31</sup>Soc. Sec. Rul. 96-8p, 1996 WL 374184, at \*1.

include in the RFC.<sup>32</sup> Therefore there is no inconsistency in the ALJ determining plaintiff has a severe impairment that causes no more limitation than plaintiff's RFC included.

Plaintiff also argues that the ALJ did not discuss evidence from the State agency consulting physician, who noted that she had difficulty rising from a seated position and difficulty walking; nor did he discuss evidence that her daughter helps with some of her activities of daily living. While the ALJ may not have mentioned every piece of evidence from the record, he supported his determination that plaintiff's complaints were not fully credible with substantial evidence from the record.

Plaintiff notes that the ALJ mentioned her lack of consistent medical treatment and her use of over the counter pain medication without first considering any explanations plaintiff may have had for her conservative treatment.<sup>33</sup> The ALJ's opinion would have been more complete had he discussed any explanation for her lack of treatment. But plaintiff did not provide any explanation; she merely suggested that the ALJ should have asked her about it at the hearing. Nevertheless, even without this evidence, the ALJ had substantial evidence for his decision.

Plaintiff further contends that the ALJ erroneously found that there were inconsistencies in her testimony. The ALJ mentioned that plaintiff testified that blackout spells caused her to fall down, yet she told doctors she never lost consciousness during these spells. The ALJ was referring to an examining physician's report dated August 23, 2001, which indicated that during blackout spells plaintiff "does not apparently lose consciousness," nor fall out of her chair or slump forward, noting that

---

<sup>32</sup>See *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987).

<sup>33</sup>See Soc. Sec. Rul. 96-7p, 1996 WL 374186, at \*7-8 (stating that the ALJ should not make inferences about a claimant's failure to seek medical treatment without considering any exceptions the claimant may provide).

plaintiff is not exactly aware of what is going on around her. The physician also stated that he believed it likely that plaintiff had benign positional vertigo “with, perhaps, some further embellishment of her symptoms.” While this August 2001 physician’s report is not completely inconsistent with her testimony in June 2003, it is probative of her lack of credibility.

Plaintiff similarly challenges the ALJ’s finding of another inconsistency; plaintiff testified that she had blackout spells about twice a week, but the August 2001 physician’s report noted that Plaintiff reported having the spells sometimes two to three times a day. Plaintiff claims that this is not inconsistent. The blackouts could happen two times on only one day of the week. But a review of plaintiff’s testimony reveals a glaring inconsistency. Plaintiff testified that the frequency of these spells had increased over time. More than two years before the hearing, the spells occurred once a month; then about two years to six months before the hearing, the spells occurred about once a week; and in the six months prior to the hearing, twice a week. Thus, according to that testimony, in August 2001 when she told the physician she was having spells two to three times a day, she was actually only having one spell a week. It was not improper for the ALJ to rely on the inconsistencies in plaintiff’s testimony.

In short, the ALJ considered the entire record, set forth the specific evidence he relied upon, applied the correct legal standards in evaluating plaintiff’s testimony, and based his determination on substantial evidence in the record as required. Because credibility determinations are ultimately left to the ALJ when he has substantial evidence, the Court finds that the ALJ’s decision regarding plaintiff’s credibility is not erroneous.

#### *B. RFC Determination*

Plaintiff contends that in determining her RFC, the ALJ failed to include all of her limitations,

including pain, which in turn precluded him from performing a proper function-by-function analysis. However, as explained above, the ALJ properly determined that plaintiff's complaints of pain were not fully credible. The ALJ also included a proper function-by-function analysis of RFC in his decision.<sup>34</sup> Plaintiff also believes the RFC determination was incomplete because the ALJ did not mention an examining physician's observation that she had difficulty squatting and arising from a seated position. However the ALJ did determine that she could only occasionally stoop, kneel, crouch, and crawl, which he derived after reviewing all the evidence in the record.

Plaintiff again argues that because the ALJ determined that her severe impairments included arthritis and degeneration of the lumbar spine and knees, he had to include some limitation based on these impairments in his RFC determination. But a severe impairment is one having more than a minimal effect on a claimant's ability to do basic work activities;<sup>35</sup> while an RFC limitation includes "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis."<sup>36</sup> Therefore, an ALJ may find that an impairment has more than a minimal effect on plaintiff's work abilities, yet would not impair plaintiff from performing sustained work related activities on a regular and continuing basis. The ALJ considered the evidence of plaintiff's arthritis and degeneration of the lumbar spine and knees; and determined that neither caused any limitations on her ability to work other than the limitations listed in her RFC.

---

<sup>34</sup>See Soc. Sec. Rul. 96-8p, 1996 WL 374184, \*5. (stating that a proper function-by-function analysis requires consideration "of seven strength demands: i.e. sitting, standing, walking, lifting, carrying, pushing, and pulling.")

<sup>35</sup>*Williams*, 844 F.2d at 751.

<sup>36</sup>Soc. Sec. Rul. 96-8p, 1996 WL 374184, at \*1.

Furthermore, the Court rejects plaintiff's argument that the ALJ did not sufficiently discuss the evidence before determining her RFC. The ALJ sufficiently discussed the evidence and his reasons for determining plaintiff's RFC. None of the evidence plaintiff mentions shows that the ALJ failed to properly determine her RFC.

### *C. ALJ's Step Four Analysis*

Plaintiff contends that the ALJ did not apply the correct legal standards in determining that she could return to her past relevant work. At step four of the sequential evaluation process, the ALJ must complete three phases: (1) evaluating the claimant's physical and mental RFC; (2) determining the physical and mental demands of the claimant's past relevant work; and (3) determining whether the claimant has the ability to meet the job demands found in phase two despite the mental and physical limitations found in phase one.<sup>37</sup> The ALJ must make specific findings at each of these phases.<sup>38</sup>

Plaintiff argues that the ALJ erred at phase two by not making a specific finding about the physical and mental demands of her past work as a counter helper and waitress/cashier. The ALJ acknowledged that the vocational expert's (VE) testimony that counter helper and waitress/cashier were light work. And the ALJ found that because plaintiff's past work did not require work activities precluded by her medically determinable impairments, she could return to work she performed in the past. But the ALJ did not expressly rely on the VE's testimony about the physical and mental demands of plaintiff's past relevant work, other than to say it was light work. This may have been sufficient if the ALJ had determined that plaintiff could do the full range of light work. But the ALJ determined plaintiff

---

<sup>37</sup>*Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996)).

<sup>38</sup>*Id.*

had some nonexertional limitations that reduced the light work level two to three percent. This required a specific finding regarding the demands of her past work and whether, based on her RFC, she could perform that work.

Despite the ALJ's failure to complete all of the three phases at step four, his step five analysis was complete. The ALJ properly determined plaintiff's RFC, and then determined that based on that RFC plaintiff could perform a full range of unskilled, sedentary work. An ALJ may make a step five determination even if he finds that plaintiff is not disabled at step four.<sup>39</sup> Plaintiff did not challenge the ALJ's step five finding, and that finding is a sufficient basis to determine plaintiff not disabled regardless of the merit of plaintiff's arguments relating to step four.<sup>40</sup>

In sum, after carefully reviewing the record in this case and considering all of plaintiff's arguments in light of the record, the Court concludes that substantial evidence supports defendant's decision to deny plaintiff's application for disability benefits and that no deviation from established legal standards occurred.

**IT IS THEREFORE ORDERED BY THE COURT THAT** plaintiff's motion for judgment is **denied** and defendant's decision denying plaintiff disability benefits is affirmed.

**IT IS SO ORDERED.**

Dated this 10<sup>th</sup> day of August, 2004, at Topeka, Kansas.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge

---

<sup>39</sup>*Murrell v. Shalala*, 43 F.3d 1388 (10th Cir. 1994).

<sup>40</sup>*See id.* at 1389-90.